



**Australian Government**  
**Australian Public Service Commission**

Ms Sia Lagos  
Chief Executive Officer and Principal Registrar  
Federal Court of Australia

By email:

Dear Ms Lagos,

I am writing to notify you of the outcome of the findings and recommendations I have made concerning recruitment practices at the Federal Court of Australia (FCA).

As you will recall from my previous correspondence to you, a public interest disclosure concerning certain recruitment practices at the FCA was allocated to the Australian Public Service Commission for investigation under the *Public Interest Disclosure Act 2013* (PID Act).

I hold a delegation under section 77 of the PID Act to conduct the PID investigation and prepare a report, which I finalised on 9 December 2020.

Summary of allegations and evidence

The discloser made a range of allegations concerning the recruitment practices of the FCA, broadly being that the following recruitment processes were not properly gazetted nor properly undertaken:

- a. engagements of Susan O'Connor, Claire Gitsham, Matthew Benter, Phillip Allaway, Rupert Burns and Tuan Van Le as National Judicial Registrars in the FCA;
- b. engagements of Murray Belcher and Russell Trott as National Judicial Registrar and District Registrars in the FCA; and
- c. engagements of Rohan Muscat and Caitlin Wu to National Registrar positions in the FCA.

Between 10 September 2020 and 27 October 2020 I sought, and you provided, information about each of those recruitment processes. The information the FCA provided included extensive information about each recruitment process, relevant gazettal information and a role review process that had resulted in certain positions being found suitable for either a Legal 2 or SESB1 position, depending on the relative complexity and work load in relevant registries.

Following my review of the evidence provided by you up to 27 October 2020, I was satisfied that the allegations of disclosable conduct concerning each of the recruitment processes was not substantiated, except in relation to the promotion of Ms Wu to a National Registrar position.

On 16 November 2020 I provided the relevant allegations, evidence and my potential adverse findings in relation to the recruitment process concerning Ms Wu to you to afford you and the FCA the opportunity to provide further evidence or comments for my consideration.

On 23 and 24 November 2020 the FCA provided me with further information and statements concerning that recruitment process. The relevant allegations, evidence and findings are set out below.

### Promotion of Caitlin Wu

#### *Allegations*

The disclosure alleged that, on 5 December 2016, Ms Caitlin Wu was promoted into the position of National Court Framework Registrar, for which she did not hold the advertised essential role requirement of being admitted as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia.

#### *Relevant evidence*

Vacancy notice 10690165, as provided by you, listed "admission as a practitioner of the High Court or the Supreme Court of a State or Territory of Australia" as an essential role requirement for the advertised position.

According to materials provided by Ms Wu in support of her application for the position and your further evidence, Ms Wu did not have, and was not eligible to hold, a practicing certificate when appointed to the position.

Eligibility for admission was not addressed in the selection report, nor in the letter of offer to Ms Wu.

When this was put to you and the FCA for comment, the FCA confirmed that, at the time of recruitment:

- a. Ms Wu was not admitted as a legal practitioner;
- b. There was nothing to suggest that, at that time, Ms Wu had completed nor commenced a Practical Legal Training program or equivalent; and
- c. The consideration by the selection panel about Ms Wu's eligibility was "limited to her having graduated...in 2014 with a Bachelor of Laws and her intention to enrol and become admitted in 2017"

#### *Relevant legislation*

Section 10A of the *Public Service Act 1999* (PS Act) sets out the APS Employment Principles. Relevantly, paragraph 10A(1)(c) of the PS Act recognises that the APS is a career-based public service that makes decisions relating to engagement and promotion that are based on merit. For the purposes of paragraph 10A(1)(c) of the PS Act, subsection 10A(2) of the PS Act sets out the circumstances in which a decision relating to engagement or promotion is based on merit.

#### *Adverse findings concerning the recruitment of processes of the FCA*

On the basis of the relevant evidence I have considered, I have found on the balance of probabilities that Ms Wu did not hold an essential qualification for the position and that no reasonable efforts were made throughout the selection process to determine whether she was eligible to be admitted to practice.

I therefore have found on the balance of probabilities that the recruitment process that ultimately led to the FCA promoting Ms Wu into this position did not have comply with the APS Employment Principles under subsection 10A(2) of the PS Act in one or more the following respects:

- a. All eligible members of the community **were not** given a reasonable opportunity to apply to perform the relevant duties, because:
  - i. if admission as a legal practitioner was not essential for performance of the role, listing it as an essential requirement in the advertisement may have precluded other

members of the community with the same qualifications as Ms Wu from applying for the position.

- b. An assessment was not made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process, because:
  - i. admission as a legal practitioner is listed as essential for performance of the role, but does not appear to have been considered as part of the selection process.
- c. The assessment was not based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required to perform the relevant duties, because:
  - i. admission as a legal practitioner was listed as essential for performance of the role, i.e. as a work-related quality genuinely required to perform the relevant duties. Ms Wu did not have this work-related quality, and was selected over a field of candidates all of whom did have this work-related quality.
- d. The assessment did not focus on the relative capacity of the candidates to achieve outcomes related to the relevant duties, because:
  - i. the position description notes that the position "requires the occupant to perform statutory legal functions ... therefore, legal qualifications and admission as a practitioner ... is essential". Ms Wu was not admitted as a legal practitioner but was selected over a field of candidates all of whom were admitted as legal practitioners.

On the basis of the evidence I have considered, I have made a finding that the APS Employment Principles were not followed in relation to the recruitment process that led to the promotion of Ms Wu because either:

- a. the role was incorrectly advertised as having an essential requirement, which potentially precluded eligible members of the community from applying for the position; or
- b. a candidate who did not meet an essential requirement of the role was engaged over numerous candidates who did meet this requirement.

I also found that the relevant employment practices of the FCA were therefore in contravention of section 10A of the PS Act, and that disclosable conduct, within the meaning of item 1 of the table in subsection 29(1) of the PID Act, had therefore been engaged in by the FCA on the basis that the relevant employment practice of the FCA in relation to the engagement of Ms Wu was conducted in contravention of the PS Act, being a Commonwealth law.

I note for completeness that I have drawn a distinction between the process concerning Ms Wu, and that concerning Mr Muscat, in which similar allegations had been made. This was on the basis that:

- a. in Mr Muscat's case, there was a clear pathway to eligibility within a reasonable time after the recruitment process, which was signalled in his application and CV; and
- b. it was reasonable to expect that other members of the community who had an anticipated date for admission to legal practice in the very near future would have felt it was open to them to apply for the position.

I therefore made no adverse findings of disclosable conduct in relation to that recruitment process.

#### Recommendations

In response to my adverse findings concerning the recruitment practices of the FCA, I recommend:

- a. that staff at the FCA be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature; and
- b. relevant FCA staff familiarise themselves with the APS Code of Conduct, and in particular paragraph 13(11)(a) of the PS Act, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles.

While I did not make any adverse findings concerning the engagement of Mr Muscat, as a matter of best practice it may have been advisable for the selection panel to more explicitly record the reason for shortlisting, interviewing and selecting such a candidate. I reiterate my recommendation that FCA staff be provided with guidance and/or training about the APS Employment Principles prior to undertaking any recruitment action.

Additionally, while I did not make any adverse findings in relation to the other recruitment processes undertaken by the FCA, I note that more clear and transparent communications from the FCA about the role review process, including the changing nature of the National Judicial Registrar role to allow it to be held at either a Legal 2 or SESB1 position level, may have been advisable to reduce the risk of misunderstanding in relation to those roles. I have therefore recommended that future FCA role reviews or restructuring exercises are communicated to staff in a transparent and clear way to reduce the risk of misunderstanding and/or misinformation.

*Next steps*

As the Agency Head of the FCA, you are responsible for responding to the findings and recommendations of the report.

I remind you that under the PID Act it is an offence to take reprisal action against any person on the basis that they or any other person made, or may have made, a disclosure under the PID Act, or to reveal the identity of a discloser. Given this and the sensitive nature of PID investigations, I would therefore appreciate your ongoing discretion in responding to this investigation, and ask that this correspondence, and all information relating to this PID investigation, is treated on a confidential and need-to-know basis only.

Thank you for the assistance you and the FCA have provided to me over the course of the investigation.

If you would like clarity about any of the findings or recommendations, please contact me on [redacted] or at [pid@apsc.gov.au](mailto:pid@apsc.gov.au).

Yours sincerely



Kate McMullan

a/Assistant Commissioner, Integrity Performance and Employment Policy  
Australian Public Service Commission

23 December 2020